

Dutch Courts finds the Dutch casino monopoly not compliant with the Treaty of Rome and European Commission suggests that proposed Dutch Internet gaming monopoly is disproportionate ✖

Article by Justin Franssen

Judgement of 2 December 2005 CFR vs. The Dutch State

An article by guest author, Justin Franssen, Dutch lawyer, Van Mens & Wissellink / Amsterdam

In a main proceedings judgement of 2 December 2005 the Administrative Court of Breda rendered a landmark post-Gambelli judgement in the proceedings between the Compagnie Financière Régionale B.V. (hereinafter : „CFR“) against The Ministry of Justice and the Ministry of Economic Affairs (hereinafter: „the State“). The decision of the Breda Court can be qualified as no less than a historic victory for the supporters of the principles enshrined in the Treaty of Rome, notably articles 43 and 49 of the Treaty. After various Dutch interlocutory Courts and one main proceedings Court found the Dutch gaming legislation and policies to be compliant with the so-called Gambelli criteria in several crossborder internet gambling cases, the Breda Court ruled that the State monopoly on (casino) gambling is not effective and there is no specific evidence as to substantiate that the restrictive casino legislation is coherent and consistent.

In the case at hand CFR applied for a license to operate a casino in the Dutch municipality of Bergen op Zoom. The application of CFR was rejected mid 2003 given the legal State monopoly of Holland Casino which is a 100% State owned foundation operating 12 casinos in The Netherlands. Furthermore the State referred to the jurisprudence of the European Court of Justice and concluded that the restrictive casino licensing system is compliant with this jurisprudence.

CFR lodged an appeal with the Administrative Court against the decision of the State and a first hearing was held on 29 September 2004. After the hearing, the case was reopened by the Court on 21 December 2004 and a series of additional questions were asked of the State (please note the similarity in approach by the District Court of Arnhem in the main proceedings case between De Lotto and Ladbrokes in which the Court rendered an interlocutory judgement and asked the Ministry of Justice for comments following the Courts' initial critical assessment of the Dutch gaming policy). The State submitted a written Statement on 4 February 2005 and CFR provided the Court with its replies on 31 March 2005.

CFR reasoned that the restrictive casino monopoly goes against the principles set forth by the ECJ in the Gambelli judgement in which the ECJ hardened its stance on the proportionality principle and demanded a factually substantiated consistent coherent gaming policy from the Member States when restricting the fundamental freedoms enshrined in the Treaty of Rome.

The Court rules that Member States in principle do enjoy a wide margin of discretion as to how to regulate its respective gaming markets but the restrictions need to be coherent and consistent and the restrictions need to be justified by overriding principles of general interest such as fraud prevention and player protection. The State reasons that the casino monopoly is required and effective as this allows the State to intervene directly and to control the activities of

Holland Casino.

The Court respects this viewpoint of the State but also refers explicitly to the „suitability test“ as set out in paragraph 66 and 67 of the Gambelli judgement as an explicit additional requirement set by the European Court of Justice. Other than all previous post-Gambelli judgements by the Dutch Courts, the Breda Court derives from the ECJ jurisprudence that a factual assessment of the circumstances should be made.

In answering the Courts' questions the State takes the position that it cannot be held responsible for the excessive marketing budgets of the State operators. The Court feels that this reasoning is in clear conflict with the position of the State that a legal monopoly allows the State a maximum and effective control over the activities of a State operator such as Holland Casino. The Court feels that the State can be held accountable for not intervening in the intensive marketing campaigns of Holland Casino. The State tolerated the fact that Dutch consumers were stimulated and encouraged to participate in casino gambling.

The Court further rules that the policies of the State seem rather contra productive and no evidence is provided by the State that substantiates the envisioned effect of its policy decisions. At the time of the decision of the Court there is not even reliable or recent research available on gambling addiction.

Furthermore the Court rather critically assesses the plans of the State to further expand the offering of Holland Casino with two additional licenses as research has clearly shown that expansion of legal casino offering has negligible effects on illegal offering (substitution effects). Furthermore the State reasons that a further expansion of Holland Casino does not have a severe effect on the growth of problem gambling but the Court fiercely reacts that such reasoning is fully based on assumptions and that this is not in any way substantiated

by facts.

The Court concludes that the restrictive casino monopoly does not comply with the principles of consistency and coherency as set forth in the Gambelli judgement and abrogates the administrative decisions from the State and orders the State to fully reassess its decisions. Should the State remain not able to provide a motivation of governmental policies based on facts in this new decision then the Court will declare the casino monopoly contrary to article 49 (freedom to provide services) of the EC Treaty.

Conclusion

As in various other Member States such as Italy and Germany it seems that Holland is the next jurisdiction where evident conflicting post-Gambelli judgements are being rendered. The author feels that action on EC level is required to clarify the situation as simply excluding gambling from the Service Directive does not eradicate the ongoing conflicting post-Gambelli interpretations in various national Courts. The European Commission should also press ahead with a wide variety of betting related infringement procedures against Holland but also against Germany, France, Spain, Hungary, and Italy. Furthermore this judgement might prove to have a certain effect on the pending Dutch civil and administrative litigation on the legality of cross border internet gaming as well as on the proceedings regarding the discriminatory allocation mechanisms of (exclusive) Dutch gaming licenses initiated by various UK betting operators.

European Commission expresses fierce critique on proposed Internet gaming monopoly for Holland Casino (A copy of the reaction (English and Dutch) of the European Commission can be obtained via the author):

Recently, a proposal for a new title in the Dutch Gaming Act of 1964 was sent to the Parliament. The new suggested law provides modifications to the Act on games of chance and

contains temporary provisions on games of chance via the Internet. In effect the Ministry of Justice envisions granting Holland Casino a three-year license to exclusively operate interactive games of chance.

The proposal of the law received critique from the private slot machine industry, the Counsel of State („Raad van State“) -a consultative body in the legislative process- as well as some serious and fundamental critique from the European Commission.

First and foremost the private slot machine industry recently expressed its concerns and anger. It argues that the Ministry of Justice promised the slot machine operators a similar temporary internet gaming license as will be issued to Holland Casino. The slot machine industry feels that the Ministry of Justice does not comply with alleged earlier promises made to the industry and places Holland Casino in an unfair advantageous competitive position with the private industry, as Holland Casino will favour first mover advantages. So far, it remains to be seen if litigation will be initiated by the industry to force the Minister to reassess the suggested monopoly for Holland Casino and if the Parliament indeed backs the law when it comes up for vote in 2006.

The Council of State expressed some concerns regarding European law issues in its advice to the legislator. The Council feels that, given the proportionality principle, the limitation to a single operator should be reconsidered. In the Explanatory Memorandum the legislator explains that the justification for the choice to grant a monopoly to Holland Casino is that strict controls can be exercised on Holland Casino as it is a reputable State operator with a proven track record in effective player protection, fraud prevention etc. The Council of State remarks that it is equally possible that other operators, both foreign and domestic can also meet these requirements. The Council of State questions if the limitation to a single (Dutch) operator does not impede on the rights of

other reputable EU operators to obtain the exclusive license and therefore infringes upon the principles enshrined in article 49 of the EC Treaty.

The European Commission is much more aggressive in its comments pursuant to Directive 98/48/EC. The Commission qualifies the legislation as not being compliant with article 49 of the EC Treaty. It explicitly refers to the Gambelli judgement and concludes from the Explanatory Memorandum accompanying the proposed legislation that it „appears (...) that the Dutch Government is mainly concerned by the lost revenues (estimated by the government to be 144 million euro in 2004 which goes to (illegal and) foreign service providers“. According to case law of the ECJ it is clear though that the funding of the State coffers cannot in itself be regarded as an objective justification for a monopoly.

The Commission continues: *„The Commission has not identified valid justifications why the Dutch legislator might believe that it is necessary to restrict all cross-border gaming services offered by licensed suppliers legally established in another Member State where they are subject to appropriate controls (...) In view of the Dutch Government's ambition to combat crime the Commission notes that an independent Dutch Expert Committee, the Werkgroep Wet op de Kansspelen, which had a mandate to evaluate the relevant Act and its effects, concluded that the limitation of the number of providers did not prevent criminality and illegality. (...) (see „Nieuwe ronde, nieuwe kansen“, The Hague, 8 March 2000, p 2)*

The Commission concludes with the following revealing analyses: *„In conclusion, the Commission points out that the restrictions emanating from the new proposed provisions of the Act on games of chance, do not appear to be justified by this overriding reason. Neither do the restrictions seem to be considered proportionate to the Stated aim.“*

Attorney at law Justin Franssen

Tel. +31 (0)20-301 66 33

E-Mail: franssen@vmw.nl